Pengurus Besar,
Permodalan Nasional Berhad,
201-A, Balai PNB
Jalan Tun Razak
50400 Kuala Lumpur.

Tuan,

West Malaysian Tax Credit of 10 UK Limited Companies of Guthrie Corporation Ltd.

I refer to the above for which I have been directed to inform you that the proposal to restructure the plantation interests of Guthrie Corporation Ltd. in Malaysia and approved in September 1976, called for the transfer of all assets and liabilities of the 10 Limited Companies to Guthrie Malaysian Plantations Sdn. Bhd. and, upon their liquidation, these assets and liabilities were to be sold to six private companies in Malaysia.

With regard to the above, I wish to confirm that the transfer of the assets and liabilities to Guthrie Malaysian Plantations Sdn. Bhd. and their subsequent sale thereof to the six private companies in Malaysia, included the West Malaysian Credit.

Berkhidmat Untuk Negara.

Saya yang menurut perintah,

Sgd/—
Halimah Binti Haji Sulaiman
Bahagian Cukai,
b.p. Ketua Setiausaha Perbendaharaan.

It is to be noted that the above documents found in exhibits "LCW-12", "LCW-13" and "LCW-14" as quoted above contain opinion of law. As stated earlier opinion of law is not admissible in an affidavit. See *Development and Commercial Bank v. Cheah Theam Swee*, *supra*; and *Pioneer Shipping v. Tioxide supra.*

In paragraph 41, the deponent again said, "I am advised and verily believe ..." He did not state who advised him or what was the source of the advice. Mr. Puthucheary argued that if it was his solicitor who advised him his solicitor should file an affidavit.

Mr. Robert Lazar said that paragraph 41 contained a contention. I agree with Mr. Nadkarni when he said that an affidavit was not a place for submission. See *Alfred Dunhill v. Sunoptic, supra.*

For the reasons stated above I made an order in terms of the application (excluding paragraph 16 of the said affidavit).

KOTA TRANSPORT AGENCY SERVICE (SUING AS A FIRM)

v.

SEAH BROTHERS MOTOR (SUED AS A FIRM)

HIGH COURT, ALOR SETAR
TUAN MOHD NOOR BIN HAJI ABDULLAH J.
[CIVIL SUIT NO: 191 OF 1974]
29 JANUARY 1994

PRACTICE & PROCEDURE: Appeal against assessment of damages by SAR - Whether SAR's finding of fact erroneous - Acid test of probabilities and improbabilities - Principle of mitigation.

The case before the Court was an appeal against the decision of the learned Senior Assistant Registrar (SAR) in assessing damages pursuant to an order of Court dated 16 September 1978. Damages were assessed under two items namely:

(i) loss of use of lorry; and
(ii) post delivery cost of repair.

The learned Judge in his written judgment had found that, "the detention of the lorry after repairs and the refusal to allow its delivery to the plaintiff company was not because of RM21.90 still unpaid ... The position was such that had the plaintiff company tendered the balance of RM21.90 they would not have obtained the release of the motor lorry by the defendant company unless the whole amount was paid." Furthermore, the learned Judge was of the opinion that the defendant company had no lien on the motor lorry in question.

The SAR awarded RM400 under the first item finding that "the whole incident was due to a dispute over the balance of the repair price of RM21.90" and that the plaintiff should have tendered payment of RM21.90 to redeem the lorry. The SAR awarded RM1,000 for the second item holding that had the plaintiff made prompt payment the defendant would have released the lorry thereby minimising the state of disrepair.

Held:

[1] The SAR was in grave error. His findings were surmised on a premise contradictory to the findings of fact of the learned Judge. After evaluation of the SAR's written judgment the Court found that his erroneous finding of fact

had disorientated and discoloured his perception resulting in his substantive rejection of the plaintiff's claim for damages. Under item (i) the plaintiff claimed damages for wrongful detention of the lorry for 5 $^1/_2$ years @ RM10,665.60 per year or RM27 per day which was supported by the plaintiff company's profit and loss trading account which was submitted to the Inland Revenue Department. A Road Transport Department officer also confirmed that the plaintiff had been granted a "A" class permit to operate their lorry beyond the previous limit of Kedah/Perlis which was more lucrative.

To reject such preponderant evidence as did the SAR was tantamount to imposing on the plaintiff a higher burder of proof than proof on a balance of probabilities. The Court accepted the plaintiff's witnesses' evidence on the basis that the truth or probable truth or otherwise was not founded on the demeanour of the witnesses but rather on the acid test of their probabilities or improbabilities. In computing damages for the loss of use of the lorry the Court applied the principle of mitigation of damages and reduced the damages from RM27 per day to RM20 per day for 5 $^1/_2$ years.

[2] With regard to item (ii), after 5 $^1/_2$ years of unlawful detention the lorry was repaired at a cost of RM7,363.62 which was confirmed on oath by the plaintiff's witness but was unsupported by any admissible documentary evidence. The Court accepted his evidence that the lorry was in fact repaired but that the cost of repair was probably on the higher scale. The Court accordingly reduced the sum to half the cost of repair for mitigation of damages and discounted the installation of a new radio set.

[The order of the SAR set aside and substituted with damages for loss of use of the lorry at RM20 per day for 5 $^1/_2$ years and for cost of repair in the sum of RM3,681.81 with interest and costs].

Case referred to:

Ong Chin Seng v. Chop Lean Kooi Motors [1955] 21 MLJ 177 ***(dist)***

For the plaintiff - Salina bt. Shahabudin; M/s. Manjit Singh & Co.

For the defendant - R.C. Murugeson; M/s R.C. Murugeson

JUDGMENT

Mohd Noor bin Hj. Abdullah J:

This is an appeal against the decision of the learned Senior Assistant Registrar (SAR) in assessing damages pursuant to an order of Court.

The order of the Honourable Mr. Justice Syed Agil Barakbah dated 16 September 1978 states:

> It Is Ordered that the defendant company do deliver-up motor lorry No. KC 412 to the plaintiff company upon the plaintiff company paying the sum RM21.90 to defendant company;
>
> And It Is Secondly Ordered that the defendant company do pay the plaintiff company costs of the matter herein.
>
> And It Is Thirdly Ordered that the defendant Company do pay damages to be assessed on a date to be fixed;
>
> And It Is Lastly Ordered that the plaintiff company do pay defendant company costs pertaining to the counter-claim.

The learned Judge in his written judgement made the following finding of facts and law.

(1) *Facts*

It was clear to his mind that "the detention of the lorry after repairs and the refusal to allow its delivery to the plaintiff company was not because of RM21.90 still unpaid. The sum was too meagre that it would be most unreasonable for DW1 whose company had friendly and long business dealings with DW5 to do as he did ... The position was such that had the plaintiff company tendered the balance of RM21.90 they would not have obtained the release of the motor lorry by the defendant company unless the whole amount was paid".

(2) Law

The learned Judge was of the opinion that the defendant company claimed the lien for a wrong cause and amount and that in the circumstances he held that the defendant company had no lien on the motor lorry in question.

SAR's finding

Pursuant to the third order of the learned Judge the SAR assessed damages which the plaintiff claimed under two items namely:

(1) loss of use of lorry, and
(2) post delivery cost of repair.

(1) loss of use of lorry

The SAR awarded RM400 under this item holding that the plaintiff should have tendered payment of RM21.90 to redeem the lorry at the end of 2 days as was done in *Ong Chin Seng v. Chop Lean Kooi Motors* [1955] 21 MLJ 177.

Undoubtedly the SAR was in grave error. His finding that "the whole incident was due to a dispute over the balance of the repair price of RM21.90" was to say the least in sharp contrast to the finding of fact by the learned Judge.

In *Ong Chin Seng* the action was brought by plaintiff against defendant for alleged wrongful detention of his lorry. The defence was that the defendant was exercising his common law right of lien as charges for repairs had not been paid. It was held that the defendant's retention of plaintiff's lorry was wrongful as there was no evidence that the plaintiff had refused to pay for the charges nor was there evidence of local custom and usage to establish the lien. In that case Hill J., criticized plaintiff for acting most unreasonably for not paying the bill, under protest if necessary, to obtain possession of the lorry. Prompt and reasonable action by plaintiff by paying the amount claimed would have caused the release of the lorry in at the most two days.

In our present case the learned Judge had observed that had plaintiff paid the RM21.90 they would not have obtained the release of the lorry. Defendant had retained the lorry for a wrong cause and amount.

(2) Cost of repair

The SAR awarded RM1,000 for post delivery cost of repair of the lorry. He held that, had plaintiff made prompt payment defendant would have released the lorry thereby minimising the state of disrepair. Again the SAR surmised on a premise contradictory to the learned Judge's finding of fact.

Finding and conclusion

In my view after due scrutiny and evaluation of the totality of the SAR's written judgement I found that his erroneous finding of fact had disorientated and discoloured his perception and vision resulting in his substantive rejection of the plaintiff's claim for damages. Under item (1) plaintiff claimed damages for wrongful detention of the lorry for 5 $^1/_2$ years @ RM10,665.60 per year or RM27 per day. PW1 a qualified accountant of plaintiff company testified that plaintiff company made a turn around profit of RM5,332.80 for second $^1/_2$ of 1974 compared to a loss of RM365.80 the preceding year. PW1 supported his testimony by producing the plaintiff company's profit and loss trading account which he submitted to the Inland Revenue Department. He further testified that the profit was generated by the grant of 'A' class permit to plaintiff to operate their lorry to Kuala Lumpur and not limited as previously within Kedah/ Perlis. A Road Transport Department officer confirmed that plaintiff was granted an "A" class permit which is more lucrative.

In my view to reject such preponderant evidence as did the SAR is tantamount to imposing on the plaintiff a higher burden of proof than proof on the balance of probabilities. I accept their evidence the truth or probable truth or otherwise is not founded on the demeanour of the witnesses but rather on the acid test of their probabilities or improbabilities. Be it as I found it, in computing damages for the loss of use of the lorry I had applied the principle of mitigation of damages and thereby reduced the damages from RM27 per day to RM20 per day for 5 $^1/_2$ years.

With regard to item (2) after 5 $^1/_2$ years of unlawful detention the lorry was repaired at a cost of RM7,363.62. This was confirmed on oath by an account administrator with plaintiff company. He produced exhibit Id.5 which document was not tendered by the maker and hence inadmissible. But the same witness said that he had the receipt for the payment of the bill of repair but that he had given it to his Counsel. I would have accepted his evidence that the lorry was in fact repaired but that the cost of repair was probably on the higher scale. Less an amount for mitigation of damages and discounting the installation of a new radio set I accordingly reduce the sum to half the cost of repair.

Thus I set aside the order of the learned SAR and substitute therefor damages for loss of use of the lorry at RM20 per day for 5 $^1/_2$ years and for cost of repair at half the cost in the sum of RM3,681.81, with interest and cost.